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Supreme Court, U.S.
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No. 00-866

In The

Supreme Court of the United States

CLARK COUNTY SCHOOL DISTRICT,

Petitioner,

v.

SHIRLEY A. BREEDEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

A. "Adverse Employment Action": Breeden Concedes The Circuits Are Split And Does Not Dispute That The Other Indicia Relevant To Granting Certiorari Are Present

Breeden's Opposition is most telling in what she concedes and what she fails to address:

- Breeden concedes (Opp. 12-13) that the Circuit Courts are split on what constitutes an "adverse employment action" for purposes of the anti-retaliation provisions of Title VII [42 U.S.C. § 2000e-3(a)].[1]

- Breeden does not, and cannot, dispute that every Circuit now has weighed in on the issue, and thus the issue is ripe for review by this Court.

- Breeden does not discuss any of the cases decided by the Circuit Courts, other than the Ninth Circuit. Thus, she has not explained – nor can she – how the Ninth Circuit's recent "reasonably likely to deter employees from engaging in protected activity" definition of "adverse employment action"[2] can be reconciled with *either* the "ultimate employment action" definition used by the Fifth and Eighth Circuits[3] *or* the "materially adverse change in terms and conditions of employment" definition used by

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[1] *E.g., Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) ("The circuits are currently split as to what constitutes an adverse employment action."); *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 248 n.11 (4th Cir. 2000) ("The circuits are split as to whether an act of retaliation must be an 'ultimate employment decision' to qualify as an adverse employment action."); *Wideman v. Wal-Mart Stores*, 141 F.3d 1453, 1456 (11th Cir. 1998) ("There is a split on the issue.")

[2] *Ray*, 217 F.3d at 1243.

[3] *E.g., Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997); *Spears v. Missouri Dep't of Corrections and Human Resources*, 210 F.3d 850, 854 (8th Cir. 2000).

the First, Second, Third, Fourth, Sixth, Seventh, Tenth and Eleventh Circuits.[4]

- Breeden does not dispute that Title VII retaliation claims are the fastest growing category of discrimination complaint[5] and thus there is a pressing need for this Court to decide the issue.

- Breeden does not dispute that the issue of what constitutes an "adverse employment action" for purposes of a Title VII retaliation claim was expressly decided by and preserved in the lower courts in this case. Nor does she dispute that this case presents the issue on a limited and manageable record.

In sum, Breeden does not take issue with a single one of the indicia that bear most critically on whether **certiorari** should be granted. Nor can she. This case presents an important issue in one of the most active areas of federal employment law. The issue has been addressed by all Circuit Courts of Appeals, and there is now a *three-* way split in the Circuits.

Instead, Breeden devotes her Opposition to arguing the "facts" – her pitch being this is so clear a case of retaliation that, no matter what the state of the law is or should be, she has an open and shut case. This is an interesting perspective, since not one of the four judges

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[4] *E.g., Richardson v. New York State Dep't of Correctional Serv.*, 180 F.3d 426, 446 (2d Cir. 1999); *Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1300 (3d Cir. 1997); *Munday v. Waste Mgmt. Of N. Am., Inc.*, 126 F.3d 239, 243 (4th Cir. 1997); *Yates v. AVCO Corp.*, 819 F.2d 630, 638 (6th Cir. 1987); *Heno v. Sprint/United Mgmt. Co.*, 208 F.3d 847, 857-58 (10th Cir. 2000); *Gupta v. Florida Bd. Of Regents*, 212 F.3d 571, 588 (11th Cir. 2000); *see also Hernandez-Torres v. Intercontinental Trading*, 158 F.3d 43, 47 (1st Cir. 1998); *Hill v. American Gen.*, 218 F.3d 639, 645 (7th Cir. 2000).

[5] E. I. Klein & R. Halligan, *A Rising Tide of Retaliation Claims Challenges Employers to Adopt Adequate Preventative Measures*, 71 N.Y. St. B.J. 51, 51 (1999); M. Williams & R. Rhodes, *Recent Developments in Retaliation Law and Resulting Implications for the Federal Sector*, 28 Colorado Lawyer 59, 59 (1999).

who have looked at this case agrees with her. Even the majority of the split Ninth Circuit panel that reversed summary judgment (Judges Canby and Reinhardt), said not once, but twice, "this is a close case," (Cert. Pet. App. 5-6) and said so while applying the most liberal definition of "adverse employment action" used in any Circuit. In other Circuits, this case would not even have been "close," and the summary judgment would have been affirmed.[6] The dissenting member of the Ninth Circuit panel (Judge Fernandez) also did not think this case was even close, but rather was an unfortunate example of a miffed employee making a mountain out of a molehill. (Cert. Pet. App. 8) The district court likewise concluded, after an exacting examination of the record, that Breeden's retaliation claim was meritless. (Cert. Pet. App. 9-12, 16-22)

The *record* also does not support Breeden's self-trumpeting argument, as her "factual" argument is rife with misstatements of the record. The following examples are illustrative:

Breeden claims that in 1997 she was appointed Director of Professional Development Education ("PDE") and reassigned to an older administration site – banished to "Siberia" – in "retaliation" for filing the instant lawsuit. Breeden denigrates both her administrative position and office location. (Opp. 7-8, 11-12) The uncontradicted evidence in the *record*, however, establishes the following: PDE – teacher training – is one of the most important of the School District's administrative functions. (ER 111) Not

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[6] *Compare, Galabya v. New York City Bd. Of Educ.*, 202 F.3d 636, 641 (2d Cir. 2000) (applying Title VII principles in ADEA case, transfer from one school to another and change from special education to mainstream assignment did not result in a change of responsibilities "so significant as to constitute a setback to the plaintiff's career"); *Place v. Abbott Laboratories*, 215 F.3d 803, 810 (7th Cir. 2000) (transfer from "interesting job" that the plaintiff liked to one she did not like and which lacked supervisory duties and loss of her personal cubicle and telephone did not constitute adverse employment action).

long before Breeden's appointment, the State of Nevada issued new student academic standards, and the School District adopted extensive written goals to further enhance the quality of educational services and student performance, thus putting even greater emphasis on PDE. (ER 134) The decisions to (a) upgrade the administrative position responsible for PDE to the Director level and (b) appoint Breeden to that position were made by Assistant Superintendent Dr. George Ann Rice (*not* by Donald Eldfrick who is the target of her "factual" argument). (ER 134, 75) When Dr. Rice proposed these decisions *she did not know* that Breeden had filed a lawsuit (ER 133); indeed, Dr. Rice talked to Breeden's union about this *before Breeden ever served her complaint*. (ER 133, 137) As Director of PDE, Breeden reported directly to Dr. Rice, rather than to one of Dr. Rice's subordinates as she had previously. Breeden's salary and benefits remained at the Director level, more than $74,000 per year for the 1997-1998 school year. (ER 131-132) She had to move offices to an older administrative site where PDE was already located and that housed most curriculum and instructional support services. (ER 111) Nor was Breeden the lone administrator; numerous administrators at her level – and *above* – had offices there including, two Area Superintendents, the Director of Elementary Academic Services, the Director of Secondary Academic Services, the Director of Multi-Cultural Community Outreach Education Programs, and the Director of School to Work Program. (ER 111)

Thus, the *record* shows that Breeden's new PDE position was equally – if not more – important than her prior job managing human resources matters. Furthermore, since Dr. Rice did not know Breeden had filed a lawsuit, there is not a shred of evidence this appointment was in "retaliation" for the lawsuit. Finally, while Breeden's new office was an older administrative site, she by no means was in outer "Siberia."

Breeden also claims that three years earlier, in 1994, her human resources job was changed in "retaliation" for her informal complaint about the momentary exchange

between Eldfrick and Jim McIntosh about the "Grand Canyon" quote in a psychological pre-hire report. Breeden asserts that before the change, she was responsible for "screening," "hiring" and "firing" all 5,000 of the School District's non-licensed personnel, including school police, and that this was her "primary" job duty. (Opp. 5-6) There is a notable lack of record citations in Breeden's paragraphs devoted to this. (*E.g.*, Opp. 5-6, 11) That is not surprising, since the uncontradicted evidence in the *record* shows that Breeden did *not* play a major role in non-licensed staff hiring, had *no* hiring or firing authority over the District's 5,000 support staff employees, and that her hiring role was only one of a number of duties she performed, all of which were of *equal* importance. (ER 133, 138, 241-244, 274-275)

Breeden admits that *work site administrators* (*e.g.*, school principals) worked directly with analysts and clerks (who processed paperwork (ER 241-244, 133, 138)), reviewed applicant records, interviewed and decided who to hire for positions. (ER 244,133) Breeden approved requests to advertise outside the District (ER 243), answered questions (but, was not the only administrator who could be consulted and could answer questions (ER 241, 243, 138)), and handled complaints about the process. (ER 241, 243-244) Breeden checked the paperwork (by clerks and analysts), but had to pass it along to Eldfrick for his final approval. (ER 138) Neither Breeden, nor the analysts and clerks reporting to her, were responsible for firing the District's support staff employees. (ER 133)[7]

Furthermore, Breeden has admitted that all her duties in connection with non-licensed support staff were *equally* important and provided *equal* job satisfaction. (ER 274-275) Even the analysts and assistants she regarded as her staff

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[7] Breeden and Eldfrick together oversaw school police officer hiring; Eldfrick had to approve everything (a function previously performed by Dr. Rice). (ER 192) Breeden remained involved in police officer background checks even after the changes in December 1994. (ER 277)

(later "taken away" from her) were not even just *her* staff – both Eldfrick and another Director assigned them work, supervised that work, and answered their questions (ER 138, 249-50), and Breeden herself did not use them in responding to unemployment claims or processing of leaves. (ER 240, 247)[8]

Breeden uses her overstated and unsupported recruiting duties argument as a backdrop for an attack on Eldfrick, who engaged in the momentary "Grand Canyon" exchange that Breeden found objectionable and who allegedly became "formal" and "cold" after she spoke with him about the remark. After their meeting, Breeden's and Eldfrick's relationship was strained, but her specific complaints are all over the map. *E.g.*, ER 304, 265, 305 (complaint about communicating only through written notes, while also questioning why he kept coming into her office to bring her work and admitting the notes in any event were not insufficient to provide direction); 280 (complaining Eldfrick did not invite her to a supervisor training class on recognizing impairment and "for-cause" drug testing, while admitting drug testing "was not one of my responsibilities"); and 293 (questioning why Eldfrick, who shook hands with employees when passing out paychecks, told Breeden's secretary while Breeden was out to give the paycheck to Breeden and "shake [Breeden's] hand."). *None* of this, however, constituted sexual harassment; indeed, Breeden did not even appeal on her harassment claim. (Cert. Pet. App. 13-16)

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[8] Breeden also misstates the record in asserting that after the 1994 reallocation of human resources duties, all she was left with was handling "unemployment and FMLA claims for support staff and licensed personnel." (Opp. 6) In fact, Breeden also worked with risk management on return-to-work issues, police officer background checks, and advertising. (ER 68-69, 279, 276-77) Breeden was in no way hampered in performing these responsibilities by any lack of staff support, as she had never utilized analysts or assistants in the unemployment and leave processes. (ER 240, 247)

Breeden features alleged romantic indiscretions by Eldfrick (one of which is based on nothing more than inadmissible rumor) and a supposed statement that no one would "get away" with a "charge" against him. (Opp. 2) Breeden's attack misses the mark.

Eldfrick did *not* make the decision to realign the functions in Human Resources and modify Breeden's duties. Dr. Rice made the decision to consolidate under one Director the handling of leaves, unemployment claims and working with Risk Management on worker's compensation claims for *all* District personnel (administrators, licensed personnel and support staff). (ER 74-75) Dr. Rice, likewise, decided to take these duties *away* from those who had previously handled them for administrators and licensed personnel, give them to Breeden and commensurately shift most non-licensed recruiting tasks to Eldfrick (ER 75), along with having the analysts and clerks report directly to him. (ER 138) Breeden has never even tried to explain why this consolidation did not make sense. Nor could she. These are technical areas where the governing law and regulations often change. Having one knowledgeable and proficient administrator was imminently reasonable. Nor has Breeden ever claimed that after this change she was not busy enough. She admits that FMLA leaves, alone, took 80-90 percent of her time. (ER 276) There is, in short, no evidence that Dr. Rice, a woman herself, was "retaliating" against Breeden when she gave her these District-wide responsibilities.

Furthermore, Eldfrick's supposed romantic indiscretions have no bearing whatsoever on "retaliation" against Breeden. And with respect to Eldfrick's supposed statement that no one "would get away with" a "harassment" charge, Breeden fails to disclose that this controversy had *nothing* to do with sexual harassment, but arose out of a dispute over whether certain clerical duties were "beneath" another employee's job classification. (ER 209)

Given the *record*, unadorned by embellishment or overstatement, the summary judgment should have been

affirmed even under the Ninth Circuit's expansive definition of "adverse employment action." The judgment certainly would have been affirmed had the Ninth Circuit panel employed either of the two more limited definitions used by the other Circuits.

B. "Opposition Clause": Breeden All But Invites The Court To Provide Guidance

Breeden's response on what constitutes a "reasonable belief" that a Title VII violation occurred supporting a retaliation claim under Title VII's "Opposition Clause" also eschews any discussion of the state of the law. She addresses neither the divergence of the case law on this question within the Ninth Circuit, itself, nor case law in other Circuits with which the Ninth Circuit has parted company.

Instead, Breeden raises a procedural straw man, makes a completely new argument she never made on appeal, and finally suggests that "an interesting question" concerning the "Opposition Clause" is raised by the Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Breeden's first two arguments provide no pause as to the appropriateness of granting certiorari in this case. Her last argument is an invitation to take the case.

Breeden first argues that whether she engaged in protected activity under the "Opposition Clause" is a moot point, since she claims "retaliation" for filing this lawsuit in 1997 that is protected under the "Participation Clause." (Opp. 14) Breeden is wrong. She cannot keep her retaliation case intact by relying only on the 1997 lawsuit. First, she cannot use her 1997 lawsuit as the platform for a "retaliation" claim for the 1994 change in duties. This would be putting the cart before the horse. Second, the School District never disputed that Breeden's 1997 lawsuit filing was "protected activity" under the "Participation Clause." Rather, the problem with her claim of post-lawsuit

retaliation is that Dr. Rice, who made the decision to put Breeden in charge of PDE, commenced that change *before* Breeden filed suit; indeed, Dr. Rice spoke with Breeden's union about the change *before* Breeden ever served her complaint. (ER 133, 137) Thus, there is no *causal* relationship between Breeden's lawsuit and her PDE appointment.

Breeden next argues that more than the momentary exchange about the "Grand Canyon" remark must be taken into account in determining whether she "reasonably believed" she had been subjected to sexual harassment. Almost as though she were conceding that that brief exchange is not enough to give rise to a reasonable belief that she was subjected to sexual harassment, Breeden contends that two weeks of allegedly "cold" treatment by Eldfrick should be added to the equation. (Opp. 15-16) This is an argument that Breeden never made on appeal to the Ninth Circuit. On the contrary, Breeden focused *only* on the exchange about the "Grand Canyon" remark. (AOB 17-19) Thus, she has waived the argument. *E.g., Holly Farms Corp. v. National Labor Relations Labor Bd.*, 517 U.S. 392, 400 n.7 (1996) (petitioner failed to advance argument on appeal; Court " 'generally [does] not address arguments that were not the basis for the decision below' "). Furthermore, being "formal" and "cold" is *not* sexual harassment. *E.g., Saxton v. American Telephone and Telegraph Co.*, 10 F.3d 526, 534-35 (7th Cir. 1993) ("even if we assume that Richardson turned a particularly cold shoulder to Saxton . . . , the evidence does not suggest that this behavior rendered her environment hostile"). Thus, Breeden gets no mileage from trying to "tack on" Eldfrick's alleged two-week "coldness" to the momentary exchange about the "Grand Canyon" remark.

Breeden lastly argues that *Faragher* and *Ellerth* put employees on the "horns of a dilemma" if conduct must come "close" to violating Title VII in order for a complaint to be "protected activity" under Title VII's "Opposition Clause." Breeden asserts that *Faragher* and *Ellerth* require complaints be made early to prevent questionable conduct

from becoming unlawful, but will not be "protected activity" under the close-to-actually-violating Title VII standard, thus leaving employees exposed to retaliation without redress for fulfilling their supposed *Faragher* and *Ellerth* early-reporting duty. (Opp. 18-21)

This is an argument *inviting* review by this Court. If the close-enough standard used by the majority of Circuit Courts to determine whether an employee has engaged in protected activity under the "Opposition Clause"[9] is at odds with *Faragher* and *Ellerth* and puts employees in a "quandary," as Breeden maintains, this Court should address the question. The School District does not agree with Breeden that *Faragher* and *Ellerth* create tension in the law. Rather, the tension is between the line of Ninth Circuit cases brought to bear by the panel majority in this case, and the approach taken in other Ninth Circuit cases and used in the vast majority of other Circuits. *This* problem, which Breeden ignores, merits the grant of certiorari.

CONCLUSION

Every factor that warrants a grant of certiorari is present in this case. The School District respectfully requests that its petition be granted.

Respectfully submitted,

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[9] *E.g., Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 705 (7th Cir. 2000); *Montandon v. Farmland Indus., Inc.*, 116 F.3d 355, 359 (8th Cir. 1997); *Clover v. Total System Services, Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999).